An Overview of Normative Frameworks for the Protection of Development-Induced IDPs in Kenya

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Abstract
Based on the assumption that development induced displacement brings new challenges that the existing protection frameworks may not be aptly suited to deal with, this article analyses how the existing laws have met this challenge and the prospects for further improvement. While its focus is on Kenya, it evaluates the normative quality of protection and standards offered by regional instruments against the existing, as well emerging, parameters for implementation at the domestic level. In this regard, the article examines the propriety of Kenya’s newly promulgated law on internal displacement in providing for protection for the development induced IDPs, the implementation programme that it establishes and its prospects for furthering the vision of the UN Guiding Principles on Internally Displaced and other regional instruments.

Keywords
Development-induced displacement; IDP Act (2012) (Kenya); protection; UN Guiding Principles on Internal Displacement; Kampala Convention; Great Lakes Pact

1. Introduction
When people are moved involuntarily from their habitual residences or homes to create space for development projects, they are displaced.1 Kenya has a long history of such displacements, dating back to the colonial days.2 Although in recent

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1) In this article, the word “displacement” is defined in broad terms to refer to both physical, social and economic exclusion occurring in the context of involuntary movement from one locality to another, and the loss of rights associated with resource use that such exclusion may engender.

2) See, e.g., M. Shutzer, ‘The Politics of Home: Displacement and Resettlement in Post-Colonial Kenya’ (2012) 71 African Studies, 346–360, 348; J. Oucho, ‘The Ethnic Factor in Internal Displacement of Population in Sub-Saharan Africa’ (1997) 2 African Journal of Political Sciences, 104–117, at 109 (suggesting that a distinct feature of the British colonial administration’s economic policy in Kenya was the separation of Africans from their land and resources to create room for European settlers. This racist depredation policy of colonialism, couched in economic terms, ostensibly resulted in massive displacement of Africans. Apart from being forcefully evicted from their homes, they were confined in densely populated “reserves” to make up pools for cheap labour). From these discussions one can immediately see a similarity between colonial “reserves” and the modern day IDP “camps”. Both are “crowded sites” where authorities are able to limit movement while providing some sort of assistance. Other colonial expansionist projects, such as the Uganda-Kenya railway, which was completed in 1902, furthered these goals. The relocations and
times, displacement has often been associated with violence – another defining characteristic of Kenya’s political history – its incidence has coincided with every major political and economic innovation that the country has sought to embrace to jolt its growth statistics. All forms of displacements, whether caused by violence, ecological factors or projects, play into the grand narratives of deprivation and vulnerability, while at the same time exposing the reality of weak legal frameworks of governance, opaque and unequal mechanisms for accessing natural resources and poor human rights protection regimes. This apart, displacement has put on test the tenuous connection that exists, at the operational level, between the commitment to human rights protection and the state’s responsibility to protect. Essentially, the burgeoning scourge of internal displacement is a clear indication of the diminished capacity of most states to discharge their national responsibility and assert their sovereignty. In Kenya, the focus on displacement, particularly the plight of development induced IDPs, has unearthed the simmering discontent on land issues and unleashed forces keen to dismember the hegemony of the elite political classes over land distribution. Contemporaneously, the attention on displacement has inadvertently unlocked the hitherto unknown schemes for acquisition of natural resources perpetuated through unfavourable legislative and policy frameworks that have remained opaque to public scrutiny since independence.

Despite the foregoing, there is a sense in which development induced displacement seems to be developing its own normative trajectory. Since the formulation movements brought about by the railway project represents what one might consider to be the first phase of development induced displacement in Kenya. When, for example, the members of the Ogiek community were forcefully removed from forest areas around Mau to safeguard firewood for the locomotives in 1903, this was indeed a form of displacement. For the history of violent resistance by the Ogieks against such displacement see T. Kimaiyo, ‘Ogiek, Land Cases and Historical Injustices 1902–2004’ (2004), available online at http://freeafrica.tripod.com/ogieklanK/book.htm.


of the UN Guiding Principles on Internal Displacement\(^6\) in 1998, some normative activity have occurred at the regional and national level in Africa which indicate an increasing awareness of the plight of persons displaced by development projects. Prescient to these developments is the lurking possibility of having a fully fledged legislation in many a country, dealing exclusively with development induced displacement, before the next decade. This prediction is based on the assessment of what has been achieved thus far. And this is the purpose of this article. Based on the assumption that development induced displacement brings new challenges that the existing protection frameworks may not be aptly suited to deal with, this article proposes to assess how the existing norms have dealt with the demand for protection of development induced displaced persons as a distinct genre of internally displaced groups. While its focus is on Kenya, it endeavours to highlight how the recognition by regional frameworks of the problems associated with displacement for this category of persons have spurred national governments into action. Thus, it assesses the normative quality of protection offered by regional instruments against the existing, as well as emerging, parameters for implementation at the domestic level. In this context, therefore, the article examines the propriety of Kenya’s newly promulgated law on internal displacement in providing for protection for displaces, the implementation programme that it establishes for regional frameworks on displacement and its prospects for furthering the vision of the UN Guiding Principles on Internally Displaced and other regional instruments.

2. Development-Induced Displacement – The Problematique

The problems that beset communities that are displaced, whether by conflict, environmental disasters or large-scale development projects, are more or less the same. However, what sets the displacements caused by development projects apart is that they often lack visibility, at least from a normative perspective, and its victims are less regarded as candidates for protection because they are usually presumed to be the benefactors of the project, either locally or nationally.\(^7\) Thus, any demand for accountability is deflected by the moral high ground the government often


assumes, which justifies its use of force to repress dissent and ignore the rights and humanitarian needs of the victims of its actions. Moreover, when development-induced displacement affect a minority population, the “ethnic otherness” of the victims diminishes the political pressure on government.8 There are several examples that illustrate these complexities. As recently as 2011, 2000 Samburu families were evicted violently from their land to enable the government to establish a national park, and their protests were met with heavy handed police action resulting in the death of two people and rape of their women.9 The problems of the Ogiek community, living in the Mau area, are well documented.10 Other examples are the Boni community, who are facing displacement from their ancestral land as a result of the proposed development of a port at the coastal town of Lamu;11 and the Endorois of Lake Turkana who have also been displaced to give room for a national park. The protests and court action of the Endorois have become somewhat of an iconic symbol of popular resistance to displacement in modern Kenya.12 Despite the enormity of these events, the literature and overall discourse on internal displacement in Kenya currently focuses, almost exclusively, on the victims of the post-election violence of 2008.13 Very little is mentioned in political circles, mainstream media or in policy documents about those who are forced to sacrifice their homes for development projects in the sense that would attract their consideration as internally displaced persons.


10) Although encroachment into lands inhibited by the Ogiek community began way back in history, the recent events occurring after independence are more of interest to the discussion here. In October 2005, for example, members of this community were violently evicted from Mau Forest, their homes burnt and all other structures of community living such as schools, clinics and churches were pulled down. See A.K. Onoma, ‘Use of Land to Generate Political Support’ (2008) 33 African Development, 147–155; N. Ohenjo, Kenya’s Castaways: The Ogieks and the National Development Process (MRG. London, 2003).


This opaqueness and its debilitating effects on normative development are not unique to Kenya. Globally, the literature on protection of internally displaced focuses on displacements caused by armed conflict and environmental disasters more than on development-induced displacements. The reason could be founded on the basic anomaly of treating development and conflict as distinct phenomena, the former representing a “linear trajectory of growth and expansion of human capacities and potential”, while the latter is viewed as an “exogenous ‘disruption’ in the system”. This anomaly obscures the fact that the two are probably more interconnected than we have cared to admit. Underdevelopment often leads to poor conditions of living that in turn nurtures discontent with the system. This may then lead to violence and political strife, as we have seen in many African states. Conversely, poorly planned development interventions may also spur violence at the same time that they create displacement, as has been the case in parts of Northern Kenya mentioned earlier. The problem, however, is that the fixation with violence influences the formulation of policy and law to deal only with the victim’s needs for protection and assistance while ignoring the circumstances which create victimhood in the first place. The point I am making here is that bringing development into the mix, dissuades us from focusing on consequences of displacement only or the humanitarian responsibilities that it creates. Often, the realities of action that spur displacement are hidden, and could be buried in the development agenda, which if we do not then question the logic behind events that lead to the displacement catastrophe could be parried.

The other question to ask is whether we can we go beyond the victims needs and interrogate causes of their displacement within the framework of the existing protection regimes for the internally displaced. Again, part of the answer to this question lies in interrogating whether these regimes accommodate the dynamic understanding of the complex interrelations between the development and displacements. The view I take is that development-induced displacements justify a more integrated normative approach that not only looks at the victims humanitarian and protection needs but also confronts the factors that may lead to displacement. While acknowledging that the growing awareness about the phenomenon

16) Muggah, A Tale of Two Solitudes, supra note 15, p. 16.
of development-induced displacement is already exacting normative pressure on regimes that generally protect IDPs, I propose to appraise what has been achieved thus far, both at the international and regional level, and then critically analyse their impact on Kenya’s domestic law.

3. Overview of International and Regional Protection Frameworks

There is no question that most development projects, especially in the developing world, result in perverse pathologies, one of which is internal displacement. A study by the World Bank has showed that those displaced by development projects suffer landlessness, homelessness, food insecurity, marginalization, loss of property, as well as social disintegration. Commentators have also pointed to the rising numbers of persons displaced by development project since the latter half of the last century. In fact, some estimates suggest that the number of development induced IDPs have now exceeded that of refugees worldwide. According to the World Bank, up to 200 million people were displaced by development projects in the last two decades of the 20th century and 15 million suffer the same fate each year. Despite these staggering statistics, development projects are still viewed as necessary. The question is whether the “indisputable necessity” of development should diminish the responsibility of its purveyors to deal with the pathology of displacement, especially its impoverishing consequences on people’s lives. Cernea has argued that adverse displacement is an indication of the lack of effective mechanisms for protection of rights. “It is certainly possible”, he argues, “to protect much more effectively than current practices do the civil rights, human dignity and economic entitlements of those subject to involuntary relocation”.

In the last decade, there were considerable efforts to develop legal mechanisms, at the international, regional and national levels, to deal with internal displacement events that result in the violation of human rights and international humanitarian law. Notable in this regard are the UN Guiding Principles on Internally Displaced Persons, Declaration of International Law Principles on Internally Displaced Persons, and the Draft Code of Conduct for UN Peacekeeping Operations.

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20) Ibid.

21) Ibid.


23) Ibid., at 3678.

Persons,\textsuperscript{25} and the Principles on Housing and Property Restitution for Refugees and Displaced Persons.\textsuperscript{26} At the regional level, we have the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa\textsuperscript{27} and the Protocol on the Protection and Assistance to Internally Displaced Persons\textsuperscript{28} and Protocol on the Property Rights of Returning Persons,\textsuperscript{29} both of the Great Lakes Pact.\textsuperscript{30} But perhaps much more relevant to the discussion here, these agreements provide a normative blue print that have guided the development of binding regional treaties and national laws. Although most of the international mechanisms are non-binding, they constitute a body of rules and policy formulations that have affirmed a distinctive status for the internally displaced.

There are certain inherent weaknesses and limitations of the international and regional mechanisms that need to be mentioned. Although, generally, these mechanisms recognise that violations do occur irrespective of the causes, they lend greater emphasis to vulnerability and deprivation associated with armed conflict. This apart, most of the treaties have not been signed or ratified by a majority of states. Thus, legal obligations that they impose on states cannot be of immediate benefit to most displaced persons across the continent. For these reasons there has been a noticeable shift towards strengthening national protection frameworks. After all, IDPs remain within the sovereign jurisdiction of states.\textsuperscript{31} Indeed, many African countries today have, in addition to policy instruments, legislations


\textsuperscript{31} See N. Schrepfer, ‘Addressing Internal Displacement through National Laws and Policies; a Plea for a Promising Means of Protection’ (2012) International Journal of Refugee Law, 667–691 (suggesting that the impetus to develop domestic law has come from the assertion of sovereignty over displacement issues and the clear loss of appetite by the international community to develop a multilateral treaty for the protection of IDPs at this time).
that exclusively address IDP issues. The Kenyan IDP Act is the most recent, passed by parliament only in October 2012.\(^{32}\) However, even where national legislation does exist, states can restrict their operation on the pretext of national security. These limitations aside, it is useful to examine how these mechanisms deal with displacements induced by development projects, so as to elaborate the particular concerns that have been highlighted here.

3.1. UN Guiding Principles on Internally Displaced

After the international community overcame its fear of recognising the phenomenon of internal displacement in the early 1990s, the need for rules defining the status of displaced persons and therefore enabling the provision of relief and other humanitarian support to such persons became apparent. A movement mainly spearheaded by humanitarian organisations and churches mobilized for the appointment of a UN representative on IDPs.\(^{33}\) However, it was not until 1992 that the UN Commission on Human Rights recommended to the UN Secretary General that such appointment be made, which resulted in the appointment of Francis Deng, a respected Sudanese scholar who was at the time working at the Brookings Institution. His mandate was to examine the extent to which international, human rights, humanitarian and refugee law were applicable to IDPs. Through consultation with a broad array of scholars, practitioners and institutions, Deng was able to produce a set of Principles on Internally Displaced, in 1998. After its inauguration in 2004, the Principles have since been a source of inspiration and guidance to regional and national authorities seeking to create effective regimes for addressing the plight of IDPs.\(^{34}\)

The Principles do not contain any clear and direct provisions relating to development-induced displacement that would have shored up the visibility for this group of persons. In the first instance, it fails to offer an all-encompassing definition of displacement, defining displaced persons as those “who have been forced or obliged to flee or to leave their homes or habitual residence in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognised state border”. There is no explicit recognition of development induced-displacement in this definition. The deficiency is apparent when one considers how subsequent international instruments, such as the Declaration of International Law Principles on Internally Displaced Persons, have expanded the definition. For example, Article 2(1) of the

\(^{32}\) See C. Wafula, Parliament Passes the Bill to Improve the Lot of IDPs, Daily Nation, Nairobi, 6 October 2012.


Declaration defines IDPs as inclusive of “persons internally displaced by whatever causes, such as natural or man-made disasters or large scale development projects”, but only where the state or the responsible authority fails to protect and assist those persons, in violation of their human rights obligations. Secondly, the Guiding Principles makes only but a marginal reference to development-induced displacement in its definition of “arbitrary” displacement contained in Principle 6.35 Here, the “large scale development projects which are not justified by compelling and overriding public interests,” but which cause displacements are prohibited.36 The reference to “compelling and overriding public interest” invokes the notion of proportionality and balancing of interests that buttresses debates on the relationship between development and the pursuit for social and environmental goals. Similarly, Principle 7 enjoins authorities to make full disclosure about their intended action, seek consultations with affected communities in planning and management of their relocation and provide effective remedy to those displaced. The protections would presumably apply to any development projects that have the potential of causing displacement. Equally noteworthy is Principle 9, which may have particular significance to Kenya, since it enjoins states to protect indigenous people, minorities, pastoralists and other groups with special dependency and attachment to their lands, from displacement. In Kenya, most communities that have been displaced or are facing displacement as a result of development projects are indigenous and pastoralists groups.

This dismal reference to development-induced displacement in the Principles is understandable. Its promulgation came at the sunset of a very tumultuous decade that had seen most African states embroiled in internal political strife and armed struggles to remove one-party dictatorships. These struggles brought forth great destabilisation and resulted in massive displacement. No wonder the attention of Deng and other scholars was drawn to the urgency conditioned by the suffering of a large number of persons displaced by conflict and therefore structured the Principles to take care of what was then of eminent concern. This may also explain why some scholars view the Guiding Principle’s approach, though debateable, as

35) Note that Article 6 is a clear exposition of the right not to be displaced, which the international human rights community should applaud. It provides that “Every human being shall have the right to be protected against being “arbitrarily” displaced from his or her home or place of habitual residence”. There is no definition of the word “arbitrary” except for the mention of a few situations which according to the Principles may amount to arbitrary displacement. See also L. Marcoux, ‘Protection from Arbitrary Detention under International Law’ (1982) 5 Boston College International and Comparative Law Review, 345–375, at 347 (suggesting that in human rights parlance, “arbitrary” means much more than “unlawful” or “illegal”); M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 291 (1993) (arguing that “arbitrary” means unjust, unpredictable and unreasonable). Note that the word is used in various human rights instruments, such as Articles 9 and 11 of the Universal Declaration of Human Rights, Article 37 of the Convention on the Rights of the Child, Articles 16 and 20 of International Covenant on the Protection of All Migrants and Members of Their families, and Article 6 of the African Charter on Human and Peoples Rights.

36) Principle 6(2)(c).
centred on “needs” rather than “rights”. While there may be no question that the principles have highlighted the special needs of the internally displaced, its relevance to development-induced displacements only lie in its inspirational quality that has influenced the development of a broad spectrum of regional and national policies and legal instruments, all of which affirm that competent authorities have the responsibility to provide and ensure that all displaced persons have access to protection and basic assistance. The principles also construct what has been described as the “basic tenet of a human rights based approach to IDPs,” as it synthesizes human rights and humanitarian legal principles to fill the existing gaps in protection and assistance of IDPs. These apart, however, the Guiding Principles command universal respect and may be considered as embodying the acceptable international normative standards of protection for IDPs.

3.2. The Great Lakes Pact and the Protocol on Internally Displaced Persons

The Great Lakes region, comprising the countries of Angola, Central African Republic, Kenya, Uganda, Democratic Republic of Congo, Tanzania, Rwanda, The Sudan, Burundi and Zambia, has been an area of great turbulence. According to a recent estimate, the region is home to over four million IDPs, most of who have been displaced by armed conflict. Following from what had been a very problematic period – with the genocide in Rwanda, the civil war in DRC, the uprising in Northern Uganda, and political violence in Kenya – political leaders of the aforementioned countries held a conference in Nairobi in 2006 to design a blue print for peace and stability in the region. The conference initiated a process famously referred to as the International Conference on Great Lakes Region (ICGLR) which produced the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact). The Pact, which attempts to establish a holistic framework for dealing with security, stability, sustainable development and post-conflict reconstruction, including IDP issues in the region, contains a total of 10 Protocols and 4 Programmes of Action. The impetus to deal with the IDP phenomenon within this framework has mainly come from the need to foster lasting peace. The urgency is predicated on the fear of what returning populations and IDPs pose if their grievances are not addressed. Obviously, reconciliation and

37) See Singh, India and Internally Displaced, supra note 4, at 51 (arguing that a rights based approach “relates to responsibilities and recognises the perfect and imperfect obligations and the duty of all parties to respect the rights of others”, which in his view, the Guiding Principles lacks).
40) The Pact entered into force in June 2008. Details of how the ICGLR process unfolded, the instruments together with status of ratification can be viewed on ICGLR website at http://www.icglr.org.
peace-building efforts depend on displaced persons returning to their homes and compensation for any property lost during armed conflict, or restitution being made. Additionally, the vulnerability of IDPs makes them easy targets of recruitment by elements keen to perpetuate disorder. For these reasons, two protocols were included in the Pact dealing with IDPs: the Protocol on the Protection and Assistance to Internally Displaced Persons and the Protocol on Property Rights of Returnee Populations. As Beyani observes, the initial intention of the ICGLR may have been to establish a legal framework for the adoption and implementation of the UN Guiding Principles. That said, the outcome, in the form of the two protocols, is undisputedly innovative, forward looking and much more comprehensive than the Guiding Principles. Moreover, they are binding instruments.

The Protocol on the Protection and Assistance to Internally Displaced Persons includes wide ranging provisions that establish a binding legal framework for the protection of IDPs. Broadly, the Protocol aims at incorporating the UN Guiding Principles into domestic law, establishing protection mechanism for the “physical safety and material needs of the displaced and creating obligations to prevent the root causes of displacement”. Significantly, the Protocol has direct relevance to development-induced displacements. In addition to adopting the definition of IDPs in the Guiding Principles, the Protocol expands the same to include,

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of large scale development projects, and who have not crossed an internationally recognized State border.

The inclusion of development-induced displacement in the IDP definition has a profound impact on the elaboration of the responsibilities of states as far as the protection of IDPs is concerned. For the first time, the development-induced IDPs were recognised as such, thus removing any doubt about their status as subjects of rights guaranteed by IDP protection regimes. States must therefore be aware that another layer of protection now exists that conditions their exercise of the powers of eminent domain, when doing so results in displacement. The definition also introduces what the UN Guiding Principles did not have, that being the idea that prevention and addressing the root causes of displacement is part and parcel of

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42) Ibid.
44) Supra note 41, p. 192.
45) Supra note 28.
47) Great Lakes Protocol, Article 1 (emphasis added).
the protection agenda and that displacement need not arise from the direct action of government to acquire protection status. The definition specifically mentions displacement resulting from a development project, or from the avoidance of the effects of such development project. This implies that even where a project in and of itself does not cause displacement, but its effect on the environment makes it impossible for people to continue living in the area, the persons who are then forced to leave their homes may be considered IDPs. For example, if the project interferes with air quality or water, and the people living in the affected area then have to leave the area, those people are considered to have been displaced. What is even more significant is that if the persons who have been displaced fall into the category of person described under Article 4, then they must be accorded “special” protection. What remains unclear is the meaning of “large scale development project” and what qualifies as such.

Apart from the foregoing, the Protocol contains, in Article 5, special provisions relating to development-induced IDPs. There are four main aspects of the responsibility created in this regard. The first are the conditions that would exist on any exercise of powers of eminent domain. States can justify displacement arising out of large-scale development if there are “compelling and overriding public interests”.48 Second is the notion of participation. Here, states are required to provide full information relating to the displacement and the project and allow for effective participation of IDPs in the planning and management of their relocation.49 Third, states must investigate alternatives to the development project.50 If such is not possible, then it must endeavour to minimise the adverse consequences of the displacement or provide compensation.51 In the event that relocation is absolutely necessary, then it must provide adequate and habitable sites with ample accommodation and satisfactory conditions of safety, nutrition, health and hygiene.52 Lastly, states have obligations to ensure safe return, settlement and reintegration of IDPs.53

The Protocol requires member states to enact legislation that will “prescribe procedures for undertaking development induced displacement”54 and ensure “effective participation of Internally Displaced Persons in the preparation and design”55 of such legislation. Presumably, the drafters envisaged the need for a legal framework prescribing methods of relocation that were consistent with international regimes, notably the Guiding Principles. Indeed, the idea that the Guiding Principles was to be adopted into domestic law is explicit in Articles 6(1)

48) Ibid. Article 5(1).
49) Ibid. Article 5(6).
50) Ibid. Article 5(2).
51) Ibid. Article 5(2) and 5(4).
52) Ibid. Article 5(5).
53) Ibid. Article 5(7).
54) Ibid. Article 6(4)(b).
55) Ibid. Article 6(5).
and (2) of the Protocol. Additionally, the drafters, seemingly conscious of the need to ensure that governments allocate resources to these measures, included in the Protocol the requirement that such legislation specifies the organs that will be responsible for IDP and related issues, especially those providing protection and assistance, disaster preparedness and implementation of the legislation itself.56 Once such organs were specified, governments would have no alternative but to provide them with resources and capability to do their work and to ensure that they are not exposed to legal challenge for inability to perform their mandate. This Protocol is unquestionably a giant step towards protection of development induced IDPs within the Great Lakes region.

3.3. The Kampala Convention

When the African Union (AU) Special Summit of Heads of State and Government adopted the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention)57 in October 2009, a new binding and continental wide mechanisms for protection and assistance of IDPs was established.58 The Convention came into force on 6 December 2012, having received the fifteenth ratification pursuant to Article 17.59 Since its inception, 36 member states have signed the Convention. Interestingly, however, countries such as Kenya, Democratic Republic of Congo, Somalia, Sudan and Zimbabwe who have the highest number of IDPs in the continent have neither signed nor ratified the Convention.60 Coming barely three years after the Great Lakes Pact, the Kampala Convention provided an opportunity for establishing a more robust continental wide legal framework for expanded protection and assistance of development-induced IDPs. Unfortunately, however, the codification and drafting process was hamstrung by the usual sovereignty cleavages, poor organisation of the preparatory meetings and the overall reluctance of some governments to readily commit to a binding and expanded regime for the protection of IDPs beyond the existing soft law arrangements.

To its credit, the Kampala Convention builds on the UN Guiding Principles and transforms its Principles into binding rules of protection and assistance,
thereby affirming the distinctive legal status of IDPs.61 Its general orientation, which sets it apart from Guiding Principles, is to elaborate the obligations of states and non-state actors in the protection of IDPs. In addition, it creates monitoring and enforcement mechanisms, which, as we shall show, rely on already existing regional structures. Although it adopts the definition of the internally displaced persons provided by the Guiding Principles, its objectives are stated in a more expanded fashion. One of the objectives that may be worth mentioning from the onset is that it seeks to establish a legal framework for “preventing” internal displacement.62 Indeed, it enjoins states to “refrain from, prohibit and prevent arbitrary displacement of population”.63 This means that the Kampala Convention, unlike the Guiding Principles, is an ambitious project that seeks to adopt both the “cause” and “consequences” approach in dealing with IDP issues. How well it achieves this objective is still up for debate. Already, one is forced to wonder how its preventive scheme will benefit IDPs who are victims of development without a clear reference to development-induced displacement in the definition. Perhaps worthwhile to mention, however, is that the Convention, like other instruments before it, draws from a wealth of international and regional instruments to align its protection regime with established standards of human rights, humanitarian and refugee law.

Be that as it may, the Kampala Convention deals with development-induced displacement in two ways. First, it avoids the radical approach provided for in the UN Guiding Principles, which includes such displacement among the list of prohibited “arbitrary” displacements, and adopts a more lukewarm approach of simply enjoining state parties to prevent such displacements. Article 10 provides that:

States Parties, as much as possible, shall prevent displacement caused by projects… [and] shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects… [and] shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.

What may be readily noticeable is that the Kampala Convention departs from the Great Lakes Protocol by extending the protection to all projects, not just the large-scale ones, irrespective of whether they are carried out by public or private actors;64 but, it diminishes obligation by only requiring states to do “as much as possible”, which means that threshold of what the state must do to prevent displacement in this regard is much lower and thus open to abuse. Further, there is no requirement that states should demonstrate that the projects are of “compelling

62) Kampala Convention, Article 3.
63) Ibid. Article 3(1)(a).
64) Ibid. Article 10(1).
and overriding public interest," except where communities with higher vulnerability are concerned. The omission may not be catastrophic considering that most states have enacted limitation to the power of eminent domain in their constitutions which carry the “public interest or purpose” clause. Nonetheless, if the omission is considered together with the low threshold for the obligation to prevent development-induced displacement in Article 10(1), then there may be cause for concern. As a corollary to these obligations, states are also required to consider “feasible alternatives” in the event that their planned projects are likely to cause displacement. Other requirements, such as environmental impact assessment and other forms of forecasting, have become common in all major development projects, especially those funded by public authorities.

Secondly, the Convention has a mixed bag of schemes of protection that may indirectly benefit development-induced IDPs. For example, it imposes responsibility on states to ensure accountability of non-state actors “involved in the exploration and exploitation of economic and natural resources leading to displacement”. Exploitation of natural resources such as oil, minerals and even forests, by state and non-state actors across the continent, has directly and indirectly led to displacement and attention is therefore warranted. In East Africa, the adverse effect of dispossession associated with natural resource exploitation has been mainly felt by indigenous and pastoralist communities. There is also the curious provision in Article 3(1)(b) which require states to “prevent political, social, cultural and economic exclusion and marginalisation that are likely to cause displacements of populations”. This provision opens up interesting possibilities for constructing responsibility of a state when engaged in projects that have political, social and economic ramifications and which lead to displacement. Moreover, it reinforces the obligations mentioned earlier, such as consulting the displaced persons and exploring “feasible alternatives”.

Complementary to the schemes above, and perhaps more significant, is the attempt to establish some form of monitoring and enforcement mechanisms, which is lacking in all the previous instruments. The Kampala Convention envisages two mechanisms. The first is the Conference of Parties (COP), provided for in Article 14, that will “monitor and review implementation of the objectives of the

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65) Ibid. Article 4(5).
67) See Kampala Convention, Article 3(1).
Convention”. Interestingly, state parties are also required to report on the legislative and other measures they have taken to give effect to the Kampala Convention when presenting their reports to the African Commission on Human and Peoples Rights, as mandated by Article 62 of the African Charter on People’s Rights.69 Also, such measures are subject to review by the structures established under the African Peer Review Mechanisms (APRM).70 Together with these obligations is the right of the IDPs to approach any of the individual complaint mechanisms when their rights under the Kampala Convention are violated.71 The second monitoring and compliance facility is the right the Convention accords the African Union to intervene, upon a decision made by the Council pursuant to Article 4(h) of the AU Constitutive Act, in a member state.72 Although such intervention is limited to “grave circumstances” (defined as war crimes, genocide, crimes against humanity), it galvanises the supervisory role of the AU as regards IDP protection and assistance within member states, in terms of mobilisation of resources, sharing of best practices, and the availability of AU infrastructure for member states wishing to bolster their IDP protection mechanisms.

4. Legal Framework for Protection of Development-Induced IDPs in Kenya

The existing law and policy instruments that concern IDPs in Kenya, including the recently passed IDPs Act, have evolved from a conflict paradigm. Therefore, they are conditioned by abhorrent experiences of suffering brought about by political violence linked to competition over resources and power. This is rather paradoxical considering that some of the early displacement events, which had massive repercussions, were development related. From as early as the 1900s when the Maasai were removed from their lands to create room for British settlers,73 to the recent forceful displacement by the government of the Endorois community from around Lake Turkana, to allow for the establishment of a national park, development-induced displacement has been a common feature of Kenya’s

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69) Kampala Convention, Article 14(4).
71) Kampala Convention, Article 20(3).
72) Ibid. Article 8(1).
political and economic history. That it has not attracted normative attention speaks to the complexity of what Ulrich Oslender refers to as the global capitalist logic of displacement – a global trend that links development and displacement in a manner that is insensitive to the plight of the local victims of development.\(^74\) In the post-independence period, development projects in Kenya that have caused major displacements include dams,\(^75\) irrigation and commercial agriculture, natural resource extraction, urban infrastructural improvements,\(^76\) conservation and creation of Game Parks and Game Reserves.\(^77\) The victims of these projects, who suffer environmental, economic, social and political dislocation, have no legal protection and are rarely recognised. The pervasive neglect of the development-induced IDPs is a clear indication that the government has not lived up to its public duties both to protect and respect the rights of its citizens.

4.1. The Internally Displaced Persons Act 2012

Kenya has taken a giant step towards realising the vision of the UN Guiding Principles on Internally Displaced persons by enacting a law on IDPs. It has now joined a handful of African nations that have also adopted policies and/or law to implement the UN Guiding Principles and establish national framework for protection and assistance to IDPs.\(^78\) The Bill, which was originally drafted by Turkana Central Member of Parliament, Ekwe Ethuro, was passed by Parliament in October 2012. Although attempts to pressure parliament to enact some kind of law for the protection and assistance of IDPs can be traced back to July 2003, when a motion to that


\(^{76}\) Displacements that have occurred in main urban areas such as Nairobi and Mombasa are caused by slum upgrading and infrastructural development. See V. Metcalfe, S. Pavanello and P. Mishra, Sanctuary in the City: Urban Displacement and Vulnerability in Nairobi, HPG Working Paper (2011) at 7, available online at http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7289.pdf (discussing how about 2000 people were displaced when the government constructed a bypass ring road through Kibera slums in Nairobi).


effect was tabled by Koigi Wamwere, the pugnacious Member of Parliament from Nakuru, which was passed, but to no effect, this new process that has yielded the current Bill only began in November 2010. That was when the Parliament set up a Select Committee on the Resettlement of Internally Displaced Persons and entrusted upon it the responsibility to “examine policies and law governing all forms forced displacements with the aim to promoting protection and improving well being of forced migrants” and to “come up with a draft Bill on forced migrants”. In carrying out its mandate, the Committee engaged the public in its deliberations and was able to hold hearings in areas with greater concentration of IDPs. It should be noted as well, that the Committee involved a number of stake holders and think tank groups such as Kituo Cha Sheria, Kenya National Commission on Human Rights, Kenya Red Cross Society, IDP Network, International Displacement Monitoring Centre (IDMC) and the Internal Displacement Policy and Advocacy Centre (IDPAC), in its work. This has created trust and strengthened the cooperation between government and external agencies that will be necessary for the successful implementation of the new law. The Committee’s term came to an end in December 2011 after it had prepared a draft Bill, which was first tabled in parliament for debate in June 2012. The law was finally passed by parliament in October 2012 and attained its presidential assent just a day before the end of that year.

Prior to the Act, the institutional structure dealing with the IDP issues evolved from the National Accord and Reconciliation Act (2008) (NARA) signed by President Kibaki and his Prime Minister, Raila Odinga, which ended the post-election violence of 2008. NARA enabled the establishment of the National Accord Implementation Committee and tasked it with the responsibility of preparing the Grand Coalition Government’s programme of action. This Committee in turn prepared the National Reconciliation and Emergency Social Economic Recovery

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82) See Wafula, Parliament Passes the Bill, supra note 32.


Strategy,\textsuperscript{86} in which it outlined its action plans in four priorities areas: national reconciliation and peace building, resettlement of IDPs, economic revival and positive engagement of the youth. As far as the IDPs were concerned, the government’s objective was to ensure quick resettlement so as to avert political backlash. The objective was broadened to include the promotion of economic development, prevention of the IDP camps from becoming fertile grounds for recruitment into militia and criminal gangs, and enhancing protection of human rights of those displaced. To achieve these objectives, the government set up another committee, the Mitigation and Settlement Committee, whose terms of reference included the monitoring and evaluation of the resettlement and reintegration process “with a view to deal with emerging problems”, mobilization of “resources both internally and externally to help in the resettlement and reintegration of IDPs” and advocacy on IDPs rights.\textsuperscript{87}

The NARA framework conceptualised the IDP protection measures as comprising the guarantee of access to property formerly owned or provision of alternative land for resettlement, economic support to IDP households, and the enhancement protection of human rights. It did not envisage the enactment of any legal framework to put these imperatives into legally enforceable obligations of the state. All what was anticipated was that its strategies would be carried out in conformity with international standards and with collaboration of international and regional organisations. When the political situation stabilised, the IDP issues became less of a priority. Without a clear policy and proper coordination of resettlement and compensation, programmes have been haphazardly implemented leaving a majority of IDPs still languishing in horrid situations within camps.\textsuperscript{88} The new Act is therefore a welcome development. Its purpose, which is to give effect to the Great Lakes Protocol on Protection and Assistance to the Internally Displaced Persons and the UN Guiding Principles on Internal Displacement, will ensure that the Kenyan government live up to the expected international standards of protection for IDPs. The provisions of the Bill give effect to the general philosophy of protection and assistance espoused by these two instruments. It is curious that the Bill does not mention the Kampala Convention, perhaps because Kenya has not ratified the same.


\textsuperscript{87} Ibid., at 13.

4.1.1. Definition

The manner in which IDPs are defined has a crucial importance for designing legal regimes for their protection and assistance. As already stated, part of the reason why development-induced displacements do not attract normative attention is because they lack visibility. Their inclusion in the definition by the Great Lakes Protocol was thus a huge improvement. The Act has adopted the definition in the Protocol and therefore defines an IDP as,

A person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.89

What this means is that all programmes that hitherto benefited only the IDPs displaced by the political violence in the 1990s and after the 2007 general election will now be extended to communities and persons relocated from forest areas and by development projects such as game reserves and mining. Obviously, the policies currently being pursued by government ministries tasked to deal with IDP issues by the NARA must now be revised to accommodate the development-induced IDPs who qualify for protection and assistance under the Bill.90 The Bill, like the Protocol, talks about “large-scale projects,” without defining it. The interpretation here could be that the Bill seeks to limit its application to projects likely to have profound impact on a larger section of society and perhaps, the most vulnerable population, and not just private construction affecting one or two adjoining property owners. Since most development projects that can meet this threshold are carried out by government, the definition will have effect in restricting how the government exercises its powers of eminent domain, the implications of which I discuss later in this article.

4.1.2. State Obligations

From a protection and assistance point of view, the obligation placed on the state is indeed the corner stone of the domestic framework that the Bill seeks to establish. It begins by adopting the Great Lakes Protocol on IDPs and the Guiding Principles as part of law in Kenya.91 Therefore, all obligations decreed by the two instruments have become binding on the state. I have already discussed the salient features of their protection and assistance framework in the previous section, but over and above the adopted law, there are certain aspects of the Bill that attract some comments. Interestingly, the Bill sets benchmarks for prevention of

89) See IDP Act (2012), para. 2.
90) The main focus of government response to IDP problems has been resettlement. For problems associated with this goal, see Juma, Normative and Institutional Approaches, supra note 85 at 271–274.
91) See IDP Act (2012), para. 10.
displacement, including development-induced displacement. Section 4 provides that the government must “guard” against factors that may cause displacement and also prevent displacement. Thus, it is enjoined to raise public awareness about the phenomenon and establish prevention mechanisms. These benchmarks are further elaborated in the Bill, not just in the context of prevention, but also as protection measures. Apart from prevention, states have an obligation to provide information and engage in consultations in respect to any development project which is likely to cause displacement. The Bill is specific that such engagement and consultation should occur before the project is implemented. The engagement and consultation should aim at “seeking free and informed consent of affected persons”. The Bill goes further to prescribe public hearings as one of the methods for seeking such consent. The principle of engagement is well developed in South Africa, especially with regard to eviction law. Municipal authorities, as well as government departments are required to “meaningfully engage' with unlawful occupiers of premises before evicting them. Also, the principle is finding considerable support in international and regional human rights jurisprudence. For example, the African Commission on Human and Peoples rights in the Ogoni Case denounced Nigeria’s failure to “involve the Ogoni community in the decisions that affected the development of Ogoniland”. The principle is gaining ground in Kenya’s constitutional practice and should, indeed, be an integral part of her constitutional democracy.

The protection against arbitrary displacement is provided for in section 6. Its wording takes on a human rights flavour, thus affording protection to “every human being” irrespective of their nationality, sex, religion and even political persuasion. Although the elements of arbitrary displacement are not specified as in the Guiding Principles, indication is made that it can only arise in acts which amount to genocide, crimes against humanity and war crimes, and therefore, punishable under international criminal law and the International Crimes Act of 2008. The Bill treats development induced displacement separately from arbitrary displacements, thus departing from the scheme of the Guiding Principles. It provides that:

92) For example, the obligation to raise awareness is prominently elaborated in Ibid. paras 17–20.
93) See Ibid. para. 22(1)(a). This provision echoes the language of Article 32(2) of the UN Declaration on the Right to Development.
95) See, e.g., Residents of Joe Slovo Community Western Cape v Thubelisha Homes 2010 3 SA 454 (CC); Occupiers of 31 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg 2008 3 SA 208 (CC).
97) IDP Act (2012), para. 23(1).
Displacement and relocation due to development projects shall only be lawful if justified by compelling and overriding public interest and in accordance with conditions and procedures in article 5 of the Protocol, principles 7–9 of the Guiding Principles and as specified in sections 21–22 of this Act.  

The evocation of the concept of public interest as a justification for displacement may be significant to this discussion because it pairs the regime of protection under the Bill with the state’s power of eminent domain, as mandated by the Constitution. Even as the concept gets more elaboration in the Protocol and the Bill itself, however, there is a sense in which it waters down the protection accorded to development induced IDPs. As used here, the concept seems to infer that this category of IDPs shall be left at the mercy of the usually undefined public. The gap becomes apparent when one considers that in a country such as Kenya, most large-scale development projects that have the potential of displacing people are undertaken by the government and properties on which they are built are more often than not compulsorily acquired under the regime of eminent domain. I attempt to create some understanding of the concept, within the eminent domain spectrum, that may be useful in constructing a proper role for government interested in protecting the rights of those displaced by projects of this nature in the later part of this article.

There is a strong criminal element in the Bill that is worth noting. Various acts including pretending to be an IDP and providing false information in the processes of verifying and profiling IDPs, have been criminalised. Thieving bureaucrats are put on notice that if they interfere with the protection and assistance of IDPs, obstruct humanitarian assistance, or misappropriate supplies meant for IDPs they will go to jail. Given the many reports in the newspapers about misappropriation of funds designated for IDP settlement, and even grabbing of resettlement lands, this creation of offences directly related to IDPs may be a welcome development.

4.1.3. Monitoring and Enforcement

The Bill establishes the National Consultative Committee on Internally Displaced Persons. The membership of the Committee shall be made up of 5 Principal Secretaries of designate Ministries, the Attorney General, Director of Public Prosecutions, the Kenya National Commission of Human Rights, Kenya Red Cross Society and three representatives of the international community. The Committee is charged with responsibility of being the focal point for coordination of all humanitarian action among the government departments, external governments,
the donor community and the United Nations; carrying out registration of all IDPs; raising awareness; monitoring implementation of the Protocol, Guiding Principles and the Bill; and advising the government on the exercise of its powers under the Bill. To enable the Committee to carry out its functions, the Bill creates a fund to be known as the Protection and Assistance to the Internally Displaced Persons Fund.103

The impetus to do something positive about IDPs has always come from political expediency. No wonder the talk about resettlement, humanitarian assistance and even compensation given to IDPs is heightened when general elections are pending. In Kenya, politics has a great influence on what the government can or cannot do. It is not clear from the Bill how the Committee will be able to retain its independence from government given that it will be incorporated into the ministry for the time being in charge of IDP matters. Apart from the foregoing, economic development and job creation is a priority for the Kenyan government. Since the Committee is largely composed of representatives of government, its activity may be hamstrung by the overarching need to further government policies, even at the expense of IDPs. Unfortunately, it is the development-induced IDPs who are likely to be disadvantaged by policies that put more emphasis on economic development than on human rights of communities to be directly affected.

4.2. Constitutional Limitation to the Power of Eminent Domain

Eminent domain refers to the power that a state normally has to compulsorily acquire (take) private property for public use.104 Since this power can override private ownership, it has tremendous implication for the exercise of ownership rights and all other contiguous rights. Basically, it allows the state to expropriate property, which is in the control of an individual or entity, so as to give a greater benefit to the public. This power is consistent with sovereign responsibility of the state and its overriding interests over access, control and management of land resources irrespective of the tenure under which the land is held.105 In Kenya, the power of eminent domain has constantly been used, since the colonial days, to support conservation (mainly the creation of Protected Areas), improvement of infrastructure and in the general management of natural resources. The exercise of this power is regulated by the Constitution and, theoretically, operates within the ambit of the Bill of Rights. The power is embodied in Article 66 of

103) Ibid., para. 15.
106) See Sifuna, Using Eminent Domain Power, supra note 104 at 85.
the Constitution which gives the state the power to regulate the use of any land or interest thereof, “in the interest of defence, public safety, public order, public morality, public health or land use planning”. Such powers, however, are not unfettered. Since acquisitions of this nature may adversely affect individuals, there is further elaboration of the power in Article 40(3) of the Constitution, mainly to ensure that government action is consonance with its constitutional obligations. This provision, therefore, establishes constitutional benchmarks that must be observed and which ensure that the acquisitions are not arbitrary or in violation of the rights to property. It provides that:

The state shall not deprive a person of property . . . unless the deprivation –

(a) results from an acquisition of land or an interest in land . . . in accordance with Chapter Five; or

(b) is for public interest and is carried out in accordance with this constitution and any Act of Parliament that –

(i) requires prompt payment in full of just compensation to the person; and

(ii) allows any person who has an interest in, or right over that property a right of access to a court of law.

There are five elements of this provision that may have implications on development-induced displacement: the idea of private property in light of the communal nature of claims that may be made; the meaning of acquisition (taking); the notion of public interest; access to court; and compensation. There is considerable literature regarding these elements of eminent domain and it may not be feasible to discuss all of them here. For my purposes, I shall only focus on two elements, namely the “public interest or purpose” and the “compensation”, both of which have gained notoriety in Kenya’s IDP discourse.

Before I do that, it may be useful to mention that the power of eminent domain does not excuse governments from their duty to protect those displaced by national development projects. Secondly, that whereas in the mainstream protection literature, emphasis is put on how to deal with the effects of displacement, the power of eminent domain necessitates an enquiry on the cause of displacement. The fact alone that it has to pass constitutional muster means that the act leading to displacement could be challenged at the same time that protection is

108) Emphasis added.
being sought. Lastly, it should be borne in mind that the Constitution is not the only law that deals with the state’s power of eminent domain. As a result of the new constitutional dispensation, three statutes relating to land have been enacted, namely, The Land Registration Act,110 The National Land Commission Act111 and The Lands Act.112 The latter has repealed the Land Acquisition Act113 which formerly prescribed the procedures for compulsory acquisitions of land for public benefit. These are now dealt with under Part VIII of the new Act.

4.2.1. Public Interest or Purpose

Let me state from the onset that it is utterly inconceivable that acquisitions which eventually lead to displacement can objectively meet the test of public interest. In this regard, therefore, Article 40(3) should be seen as providing a constitutional limitation on the power of eminent domain. The limitation is primarily based on the notion of public interest or purpose – that acquisition of private property by the state shall be in violation of rights and, therefore, constitutionally impermissible, if it does not serve public interest or purpose.114 The Constitution does not define what public interest or purpose is. Therefore, it can be rightly assumed that Constitution had anticipated that such definition or elaboration would be provided by subsequent legislations to be promulgated under Article 68. Indeed, when the Lands Act was passed in May 2012, a definition was provided. Section 2 of the Act defines public purpose as that of transportation (such as roads, railways even airports), public buildings and utilities (such as schools, hospitals, water, and even dams), public parks, security and defence installations, and settlement of squatters and IDPs. This list is not conclusive as public purpose may include “any other analogous purpose”. This provision attempts to bring state praxis into consonance with a legislative regime and the intendment of the Constitution. It by no means offers a conclusive view of what constitutes public interest or purpose. I say so because development agendas, just like public needs, are always in flux. If this list was being drafted at the dawn of independence it could probably be a lot shorter. In fact, the inclusion of “settlement of squatters and IDPs” in the list of public purposes, directly results from the experiences of post-election violence of 2008. Secondly, and perhaps much more important to the discussion here, is the question whether it is enough for the government to say that the purpose or

110) Act No 3 of 2012.
111) Act No 5 of 2012. The Act repeals a host of legislation (Indian Transfer of Property Act 1882; Government Lands Act, Cap 280; Registered Titles Act, Cap 281; Land Titles Act, Cap 282; and Registered Land Act Cap 300) and is bound to have greater impact in the management of land resources in Kenya.
112) Act No 6 of 2012.
114) Note that the limitation in the property rights clause of the African Charter on Human and Peoples Rights is based on “public need”, “general interest of the community” and “in accordance with the provision of appropriate law” (Article 14).
action for which it has acquired the land is included in the list. Should not public purpose or interest mean much more that the stated object of acquisition?

The public purpose or interest envisaged by the Constitution is undoubtedly that which takes into account the broad interest of the public and the Bill of Rights. It is therefore not possible to define public purpose without recourse to human rights. As Ocheje rightfully observes, “human rights assure human dignity and, given the global consensus on these rights as evidenced by the international Bill of Rights, their denial under any circumstances furnishes proof of anti-people policy”. Moreover, the Constitution itself decrees that one of the values and principles of governance is the respect for “human dignity, equity, social justice, inclusiveness human rights, non-discrimination and protection of the marginalised.”

If, therefore, a development project is deemed to be in the interest of the public, its implementation must not occasion flagrant violation of rights, must respect dignity and ensure the protection of the marginalised. What this means is that public interest or purpose must be construed broadly, taking into account not just the legislative mandate, but whether its implementation will further the interests of all involved – without violating the rights of a section of the population. To ensure that public interest or purpose is not merely a balm to soothe the conscience of government officials who are aware that their action might spur discontent, its logic should necessarily embody three considerations. The first should be community consensus, which can be achieved through consultation and inclusive participation. After all, if we talk of a public purpose which public are we referring to? The ideas of participation and consultation are key to constructing any regime for the protection and assistance of IDPs generally. Most development related acquisitions that have caused displacement, such as that of the traditional land belonging to the Endorois community, did not therefore meet the test of public interest or purpose. The decision was top-down, without any consultations with the community. When the Kiambere dam was built, the government did not engage with the communities that were set to be displaced, but waited until the reservoirs were about to be filled and then put a notice in the daily newspaper for “all people residing or having property in the reservoir area to vacate immediately”. In numerous situations, the government merely issues notice for the community to

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115) Section 4 of the IDP Act (2012) somewhat affirms this view. It provides that “The Government and any other organization, body or individual when responding to a situation of internal displacement and the needs of internally displaced persons under this Act, shall take into account their rights and freedoms as set out in the Bill of Rights of the Constitution”.


119) Supra note 75, p. 167.
vacate the land and follows it up with violent and inhumane evictions. Engaging with the community is core to establishing the public purpose or interest in the project. Additionally, when the project has the potential of displacing people, the purpose must be determined in consideration of the event of displacement and its potential ramifications of people’s lives. Unlike in conflict-induced displacements, development projects require long-term planning and therefore provide ample opportunity for meaningful engagement and community participation in the decisions likely to affect their socio-economic and maybe political well-being. Moreover, such participation concretises the ethos of democratic governance.

Secondly, it should be established whether the displaced community will benefit from the project. Clearly, if they are likely to be left destitute as a result of the project then public purpose has not been achieved. The building of the Thika Dam, which began in 1989 and completed in 1994, displaced about 500 families. The purpose of the project was to supply water to the Nairobi metropolitan area, but it visited a great deal of hardships on those displaced. Despite the meagre compensation offered by the government, the displacement had serious socio-economic implications. According to a study by Syagga and Olima, income levels dropped drastically, rendering some families so destitute that they were even unable to pay school fees for their children. Average household earnings from subsistence agriculture and cattle was about KShs 50,000 (US $1,126) before the project, but dropped to just about KShs 9,128 (US $205) after displacement. Apart from the income, the lands bordering the dam area became unproductive and there was disruption of social life, as families were forced to split. This study suggests that proper planning which takes into account the needs of those displaced could have averted the hardships that the displaced persons faced. In the Tana Basin, where the building of dams, as well as infrastructural improvements caused massive displacements, there is a perennial problem of inter-community violence that has claimed many lives and caused a lot of human suffering.


122 Ibid., at 67.

123 Ibid.

Thirdly, is whether the property will be used for the purpose for which it was acquired. This concern stems from the unhappy legacy of Kenya’s past where politicians and connected individuals used the government to acquire huge parcels of land. Unfortunately, the concern still comes up almost every time community land is targeted for compulsory acquisition and remains a sort of cloud overhanging any development or conservation scheme sought to be made in the name of public. The claims are not, however, unfounded. For example, part of the complaint of the Endorois community was that the government, having compulsorily acquired their land, granted concessions for ruby mining on part of the land to a private company. I will not here delve into the question as to whether courts, acting as guardians of property rights, should enquire as to the intended use of the acquired land, but will note that this seemed to have been the premise upon which Justice Waki found the allocation of land for uses other than that for which it was compulsorily acquired, in *Niaz Mohammed v Commissioner for Land & Others*, to be unlawful. However, it has become apparent that when land acquired for public purpose end up in the hands of private entities, then serious doubts may be raised as to whether such acquisition meets the constitutional threshold. In *James Nyaga v Attorney General & Minister for Public Work, Roads and Housing*, for example, the original purpose of the acquisition was to construct a road. However, about twenty years later, the Commissioner of Land purportedly offered the same land or portion of it to the applicants for private development. Later on, the government reverted to its original plan, but by that time the applicants had constructed a dwelling house on the land. The government went ahead and demolished the house and the applicant then sought compensation on the basis that his rights to property had been violated. The Court rejected their claim on the grounds that the allocation by Commissioner of Lands defeated the original purpose for which the land had been acquired. Moreover, upon acquisition, the land became public and therefore held in trust for the public. The point being made in this section is that public purpose or interest is a commitment that the government makes and for which it cannot deviate.

4.2.2. Compensation

The idea of compensation developed from the fear that the power of eminent domain could be used arbitrarily. From the experiences in Kenya that were discussed above, it is quite apparent that the fear has been vindicated. Thus,

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125) *Supra* note 5.
127) HCCC No 423 of 1998. The original purpose was for construction of Nyali Bridge. Although the purpose was fulfilled a balance of land remained which was then allocated to private persons.
Compensation stands out as an important element of eminent domain because it ensures that the loss of property rights is remedied at least in the interim, and that the economic situation of the victims is not hopeless. Compensation is provided for in Section 111 of the Land Act (2012). It calls for “just compensation” to be paid promptly upon acquisition and mandates the Commission to make appropriate rules for assessment of compensation. As of writing, the rules were not yet published, but it is doubtful if they would in any significant way depart from the scheme formerly administered under the defunct Lands Acquisition Act. The Act establishes a mechanism for soliciting views of those affected by the acquisition through the Commission. Upon notice of an acquisition being issued, the Commission must institute some form of a consultative forum in which the community would presumably be able to air their views about compensation. As to the extent to which the Commission is supposed to take these into account in making an award, the Act does not say.

The clearest guidance on what compensation to the displaced persons should entail is provided, in international law, by the recommendation of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.129 These guidelines call on states to ensure that the displaced persons are paid full replacement costs of their property before they are removed; assisted with the move and supported during the transition and settlement period; assisted to restore normalcy in their lives, by regaining their income earning capacities and production levels. These guidelines are consistent with the overall objective of finding durable solutions to displacement; however, they set a very high threshold that most domestic laws are unable to meet. Generally, most legislative regimes for compensation, including the one to be established under the Land Act 2012, falls short of satisfying all the needs of IDPs. Often they are outdated, and, as Cernea notes, do not prevent serious hardships and suffering for those displaced.130 Secondly, they limit compensation to registered owners of property. This excludes many other people who benefit from the land and may have invested in it by creating a home and making a livelihood. Admittedly, a compensatory scheme that would suit IDPs should necessarily aim at durable solutions, not to merely appease the community and justify their forceful removal from the land. Thus, it may be advisable that domestic regimes be aligned to the international guidelines discussed above.

5. Conclusion

The normative landscape for the protection of development induced IDPs sketched in this article highlight the need for heightened protection, most especially as the laws governing the matter become more regional and nation specific. The Guiding Principles may have contained the blueprint for protection for all IDPs, but reserved no special space for development induced IDPs. The Kampala Convention, with its focus on Africa, converted this blueprint into a binding regime. Although it had limited reference to development induced displacement, its “cause” and “consequences” approach and the monitoring schemes it established are commendable. The Great Lakes Protocol placed protection of IDPs within the broader framework for peace and reconciliation in the region. It also created norms that gave development IDPs much more visibility than the Guiding Principles and Kampala Convention. The Kenyan IDP Act has taken its cue from the Great Lakes Protocol. It has expanded the specificities of protection for this category of IDPs and given much more force to the normative frameworks, as envisaged by the UN Guiding Principles and the Protocol. There is no doubt that the expansion of regimes for protection of persons displaced by national development programmes is likely to continue, given that states are under immense pressure to improve their economic performance. At the same time, the protection agenda for communities displaced by projects is shifting from the development discourse to the displacement discourse. This is having some effect on how we view issues such as relocation, restitution and compensation. So, instead of merely focusing on compensation or restitution we talk of durable solutions, which encompass a whole array of responses to the displacement problems. It is quite evident that the change might yield new regimes specifically designed to protect development induced IDPs.

As far as Kenya is concerned, there is no doubt that the Internal Displacement Act of 2012 avails the opportunity for the Kenyan government to take its responsibility towards IDPs, particularly development induced IDPs, seriously. It also creates harmonised pathways for international groups to intervene, in a well structured and coordinated fashion, in the design and implementation of protection programmes, undertaken under the Act or within the policy framework, to be established by the much anticipated national IDP policy. However, this is just the first step. Given the experiences of other parts of the world, and for reasons aforementioned, remedying problems associated with displacement in Kenya will not be easy. Passing a law which many may view as presenting better prospects for protecting development induced IDPs, is not a guarantee that the problem will go away. Moreover, we cannot pretend that displacement is the greatest malaise that afflicts Kenyan society at the moment, or that fixing its problems will bring about harmony, reduce violence and cure the perennial politically motivated
ethnic squabbles. There are indeed many other matters that should be factored into equation and which may need conjunctive responses. The point though, is that the displacement regimes that I have discussed here, and particularly the Internal Displacement Act 2012, offer an opportunity for Kenyans to relieve their society of the systemic pressure to stay within the bounds of the exploitative and the less rights sensitive land acquisition regimes of the past. In this way, the focus on displacement could be envisaged as a trigger for desirable legal and social change.